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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 180

FRED COSENTINO,

Petitioner,

against

THE ROYAL NETHERLANDS STEAMSHIP COMPANY,

Respondent.

BRIEF OF RESPONDENT, THE ROYAL NETHERLANDS STEAMSHIP COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1518

FRED COSENTINO,

Petitioner,

against

THE ROYAL NETHERLANDS STEAMSHIP COMPANY,

Respondent.

BRIEF OF RESPONDENT, THE ROYAL NETHERLANDS STEAMSHIP COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

This brief is being submitted by Royal Netherlands Steamship Company, the respondent above named, in opposition to the petition of petitioner, Fred Cosentino, for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner, a longshoreman employed by an independent stevedoring contractor, sprained his knee, when he slipped and fell on an allegedly slippery deck, while he was working aboard the SS ARTEMIS, a vessel operated by respondent, Royal Netherlands Steamship Company.

The above-entitled action to recover damages for his injury was tried twice in the United States District Court, Eastern District of New York. The first trial was before Hon. John F. Dooling, Jr., and a jury and resulted in a verdict in the sum of $25,000.00 in favor of petitioner. By an order made and entered on February 8, 1966, however, the Court set aside said verdict on the ground of excessiveness and ordered a new trial of the action unless petitioner agreed, within ten days, to remit $12,000.00 of the amount of the verdict (83a), which he declined to do. In setting aside the exorbitant verdict in the sum of $25,000.00 for a knee sprain the District Judge observed that the testimony of Dr. Tagliagambe, the physician who treated petitioner, in which he attempted to connect petitioner's knee condition with the accident herein, "shocked me" because he had in his possession "a pathological report from its own laboratory showing it was chronic" (76a).

The action was retried before Hon. John R. Bartels and a jury and resulted in a verdict in the sum of $1,800.00 in favor of petitioner.

Petitioner thereafter appealed to the United States Court of Appeals, for the Second Circuit, from the final judgment in the sum of $1,800.00 entered in his favor in the office of the Clerk of the United States District Court for the Eastern District of New York on February 17, 1967, and, as an incident to said appeal, brought up for review the non-final order of Judge Dooling setting aside the $25,000.00 verdict of the jury at the first trial and ordering a retrial of the action.

The judgment and order below were unanimously affirmed by the Court of Appeals, with an opinion which will be found at pages 32-34 of petitioner's moving papers herein.

A subsequent petition for a rehearing of the appeal *En Banc* was denied by the Court.

Decision Below

In affirming the judgment and order appealed from the Court of Appeals, in a *Per Curiam* opinion, held:

> "Whether a verdict is excessive and whether a new trial should be granted pursuant to a motion under Rule 59 of the Federal Rules of Civil Procedure are questions addressed to the discretion of the trial judge. Considering the evidence on the issue of damages, we find no abuse of discretion by Judge Dooling in ordering that the action be retried unless the plaintiff agreed to remit $12,000 of the jury's verdict."

The Court further held:

> "Where the district court has determined that the verdict is so excessive as to require a new trial, the question whether the retrial should relate to the issue of liability as well as to the issue of damages is likewise addressed to the discretion of the trial judge. In the present case, where the doctrine of comparative negligence is involved and the amount of plaintiff's damages is related to the issue of plaintiff's contributory negligence, it seems entirely proper to retry the entire action and not limit the issue on retrial to the amount of plaintiff's damages. The appellant has cited no precedent to the contrary. Again, we find that there was no abuse of discretion by Judge Dooling."

FIRST POINT

The ruling of the District Court setting aside the exorbitant verdict of $25,000.00 in favor of petitioner at the first trial, unless petitioner agreed to remit $12,000.00 of the amount thereof, constituted an eminently proper exercise of the judicial discretion reposed in the Court under Rule 59 of the Federal Rules of Civil Procedure.

Petitioner's injury was a very minor one, which, although it is claimed that it left some slight limitation of motion in his right knee, did not incapacitate him to any appreciable extent. By any fair standard, the $25,000.00 recovery allowed him by the jury at the first trial was not only excessive but so grossly excessive that no Trial Judge could possibly have permitted the same to stand. On the basis of the damage proof in this case, it can even be argued that the $13,000.00 recovery, which the order of Judge Dooling allowed petitioner to retain, was excessive.

If there is any principle of Federal practice that is now too firmly established to admit of doubt, it is that a motion to set aside a jury verdict on the ground of excessiveness, under Rule 59 of the Rules of Civil Procedure, is addressed to the sound judicial discretion of the Trial Judge and that his exercise of this judicial discretion will not be disturbed on appeal except for a manifest abuse thereof—which, as already noted, the Court of Appeals specifically found did not occur in the case at bar.

Neese v. *Southern Ry. Co.*, 350 U. S. 77, 76 S. Ct. 131, 100 L. Ed. 60 (1955);

Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474, 481, 53 S. Ct. 252, 77 L. Ed. 439 (1932) and cases cited in Footnote 4, page 481;

Dagnello v. *Long Island R. R. Co.*, 289 F. 2d 797, 806 (2 Cir., 1961);

Commercial Union Ins. Co. v. *Rivera*, 358 F. 2d 480, 484 (1 Cir., 1966);
Rachesky v. *Finklea*, 329 F. 2d 606, 610 (4 Cir., 1964);
City of Richmond v. *Atlantic Co.*, 273 F. 2d 902, 916-917 (4 Cir., 1960);
Hardware Mutual Ins. Co. v. *Chapman*, 272 F. 2d 614, 617 (7 Cir., 1960);
Campbell v. *Clark*, 271 F. 2d 578, 579 (10 Cir., 1959);
Virginian Ry. v. *Armentrout*, 166 F. 2d 400, 407 (4 Cir., 1948).

The jurisdiction of the Court of Appeals to review an order of the District Court, granting or denying a motion to set aside a jury verdict on the ground of excessiveness, was well defined in *Dagnello* v. *Long Island R.R. Co.*, *supra*. In declining to disturb an order of the District Court denying a motion by the defendant to set aside the verdict of the jury in that case on the ground of excessiveness, the Court of Appeals in the Second District, writing through Circuit Judge Medina, stated (p. 806):

> "If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ,

but a question of law, *Virginian Ry.* v. *Armentrout, supra.* This betokens no lack of confidence in the jury system or in trial judges."

In *Dellaripa* v. *New York, New Haven & Hartford R.R. Co.*, 257 F. 2d 733, 735 (2 Cir., 1958), the same Court stated:

> "Surely the Trial Court has the power to set aside the jury's verdict if he believes that it is excessive, but obviously that power must be exercised with due regard for the jury's primary responsibility to fix the amount of the damages. However, the responsibility for the amount of the damages awarded does not lie exclusively with the jury—its responsibility is primary, but not final. The ultimate responsibility rests with the Trial Judge who may set the verdict aside. His power to set aside a verdict as excessive implies that he has a duty to do so when he conscientiously believes that the jury has exceeded the bounds of propriety. This duty should not be avoided by hiding behind the jury's verdict. * * *"

As any lawyer who practices in any of the Federal District Courts knows, the Judges in said Courts are extremely loath to disturb jury verdicts, even though they may be high, unless they honestly believe that they are so grossly excessive as to be unconscionable—which is clearly true of the $25,000.00 verdict rendered by the jury at the first trial of this action.

Where a jury verdict is so excessive as to shock the conscience of the Court, the Trial Judge not only has the legal right but he is under a duty to set it aside.

> *Linn* v. *United Plant Guard Workers of America*, 383 U. S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966).

SECOND POINT

The District Court also properly exercised the judicial discretion reposed in it under Rule 59 of the Federal Rules of Civil Procedure in ordering a new trial of the entire action upon petitioner's refusal to remit $12,000.00 of the amount of the shockingly high verdict rendered by the jury at the first trial.

Rule 59 of the Federal Rules of Civil Procedure specifically authorizes the Trial Judge to set aside a jury verdict and to grant a new trial "on all or part of the issues, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; * * *"

Research has failed to disclose a single Federal case—nor does petitioner cite any in his brief—which holds that, in setting a jury verdict aside on the ground of excessiveness, the District Court must in every case limit the retrial to the damage issue only, as now claimed by petitioner (Pet's Br., Pts. II and III, pp. 9-30). It is submitted that in the case at bar the Court of Appeals properly held that, under Rule 59 of the Federal Rules of Civil Procedure, the question of whether the entire action or the damage issue herein only should have been retried likewise was one that was addressed to the sound judicial discretion of the Trial Judge.

In a case like the case at bar, where the comparative negligence doctrine is applicable and the issue of the contributory negligence of the plaintiff himself is so inextricably interwoven with the amount recoverable by the plaintiff that it is impossible to separate one from the other, it is difficult to understand how the Court can possibly direct a new trial of the damage issue only, without depriving the defendant of his legal right to have the recovery allowed the plaintiff reduced by an amount proportionate

to the plaintiff's own contributory negligence, which in turn is an issue that is so interrelated with the negligence of the defendant that the two issues are inseparable. Although District Judge Dooling observed that the jury's finding at the first trial that the defendant was negligent "seems to be beyond challenge" (83a), he did not suggest that the plaintiff himself was free from any contributory negligence. Furthermore, there is no way of telling from the record to just what extent, if any, the jury found that the plaintiff's own negligence contributed to the accident resulting in his injury. The District Court obviously had no more right to speculate with respect to this matter than it had to speculate with respect to anything else that may have occurred during the course of the jury's deliberations.

Although the decisions in the Federal Courts uniformly hold that, where a jury verdict has been set aside on the ground of excessiveness, the question of whether the entire action or the damage issue only should be retried is one that is addressed to the sound judicial discretion of the Trial Judge, they also seem to uniformly hold that a partial retrial of the action should never be ordered unless the issue being retried is so distinct and separate from the other issues in the case that a retrial of such issue only can be had without prejudice to rights of either party.

Gasoline Products Co. v. *Champlain Refining Co.*, 283 U. S. 494, 500, 51 S. Ct. 573, 75 L. Ed. 1188 (1931);

Roma v. *Baldwin*, 317 F. 2d 919, 922 (3 Cir., 1963);

Mason v. *Mathiasen Tanker Industries, Inc.*, 298 F. 2d 28, 33 (4 Cir.,);

Barbrow v. *McDade*, 255 F. 2d 610, 611 (3 Cir., 1958);

Atlantic Coast Line R.R. Co. v. *Bennett*, 251 F. 934, 938 (4 Cir., 1958);

Atkinson v. *Dixie Greyhound Lines*, 143 F. 2d 477, 479 (5 Cir., 1944), cert. denied 323 U. S. 758, 65 S. Ct. 92, 89 L. Ed. 607.

As heretofore noted, in the case at bar the damage issue is so inextricably interwoven with the issue of petitioner's own contributory negligence, which, in turn, can be determined only in the light of the alleged negligence of respondent, that it is impossible to divorce one of these issues from the other without depriving respondent of the benefit of the comparative negligence doctrine.

There is no conflict between the cases hereinabove cited and the holding of the Court of Appeals in the Second Circuit in *Berner* v. *British Commonwealth Airlines, Ltd.*, 346 F. 2d 532 (2 Cir., 1965), on which petitioner now relies heavily to support his claim that only the damage issue herein should have been retried (Pet's Br., Pt. 11, p. 9).

In the *Berner* case the situation before the Court was radically different from the one before the Court in the case at bar. In that case, which did not involve the doctrine of comparative negligence, the District Court not only set aside the jury's verdict in favor of the defendant on the issue of liability but then usurped the function of the jury by directing a contrary verdict in favor of the plaintiff on said issue, or, in the alternative, ordered a new trial on all of the issues in the case in the event that on appeal the Court set aside the judgment entered in favor of the plaintiff notwithstanding the verdict of the jury.

As the Court of Appeals, writing through Circuit Judge Moore, stated at pages 535-536 of its opinion of reversal in the *Berner* case, "The primary issue to be resolved upon this appeal is whether the trial court was justified in setting aside the jury's verdict in favor of the defendant and, assuming the jury's role as fact finder, granting judgment to plaintiff", which, under the facts of that case, clearly violated the defendant's constitutional right to a jury trial.

No such issue is presented in the case at bar, where the same Court of Appeals held that the Trial Judge properly exercised the judicial discretion reposed in him under Rule

59 of the Federal Rules of Civil Procedure not only in setting aside the exorbitant verdict of the jury in the sum of $25,000.00 in favor of petitioner at the first trial of this action but in thereafter ordering a retrial of the entire action in the event that petitioner declined to remit $12,000.00 of the amount of said verdict. Because the question before it in the *Berner* case was strictly one of law as to whether or not there was an issue of fact as to liability to go to the jury and whether or not the remarks of the defendant's counsel complained of by the plaintiff were prejudicial, the Court of Appeals, upon resolving these issues of law in favor of the defendant, reversed the judgment of the District Court and ordered that judgment be entered upon the jury's verdict in favor of the defendant. Although the Court also reversed the conditional grant of a new trial in the event that the judgment n.o.v. were reversed, it is clear from its opinion that, under the facts of that case, a new trial of the entire case was wholly unnecessary. It is submitted that there is nothing in this portion of the Court's opinion (pp. 541-542) to suggest that in every case where the District Court sets aside a jury verdict on the ground of excessiveness, it *must* direct a retrial of the damage issue only.

The other Federal cases cited under Points II and III of petitioner's brief likewise have no bearing whatever on the issue presently before this Court. As the Court will see when it reads the same, most of these cases deal either with the doctrine of estoppel by judgment or the doctrine of collateral estoppel, which is based upon an entirely different premise than a motion to set aside a jury verdict on the grounds covered by Rule 59 of the Federal Rules of Civil Procedure.

In *Silverii* v. *Kramer*, 314 F. 2d 407, 410 (3 Cir., 1963), from which petitioner quotes at the top of page 12 of his brief, the District Court, like the District Court in the *Berner* case, not only set aside the verdict of the jury but, in addition thereto, usurped the function of the jury by

then directing a contrary verdict. In the case at bar there is no claim that Judge Dooling usurped the function of the jury by directing a verdict in favor of either party.

There is likewise nothing in the opinion of the Court of Appeals in the Second Circuit in *Dagnello* v. *Long Island R.R. Co., supra,* from which petitioner quotes at pages 12-13 of his brief, to suggest that there was any impropriety whatever in the action of Judge Dooling in the case at bar in ordering a retrial of the entire action instead of limiting the retrial to the damage issue only, which, for the reason hereinabove set forth, cannot be divorced from the issue of petitioner's own contributory negligence, which, in turn, was dependent upon the negligence of respondent.

No useful purpose is to be served by discussing the plethora of State court decisions cited by petitioner throughout his brief, which are based entirely on State practice procedure and therefore have no bearing on the issue presently before this Court, where we are concerned only with the jurisdiction of the United States District Court under Rule 59 of the Federal Rules of Civil Procedure.

CONCLUSION

The petition for a writ of certiorari herein should be denied.

Dated: New York, New York, June 24, 1968.

Respectfully submitted,

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Of Counsel.